A **AFFIN BANK BHD v. JAMALUDIN JAAFAR; THE ASSOCIATION OF BANKS IN MALAYSIA & ANOR (INTERVENERS)**

FEDERAL COURT, PUTRAJAYA
AHMAD MAAROP PCA
HASAN LAH FCJ
B RAMLY ALI FCJ
ZAHARAH IBRAHIM FCJ
JEFFREY TAN FCJ
[CIVIL APPEAL NO: 02(f)-7-02-2017(K)]
15 MAY 2019

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LAND LAW: *Malay Reservation Land – Charge – Bank granted facilities to non-Malay borrower company – Malay man executed charge over Malay Reservation Land to secure facilities – Borrower defaulted in repayment of loan – Whether vesting of interest in Malay Reservation Land to non-Malay by way of third party*
D *charge valid – Whether fact that non-Malay was non-natural person relevant – Whether there is conflict between second paragraph in Schedule A and s. 6(2) of Kedah Malay Reservations Enactment No. 63 – Whether there is statutory provision prohibiting Malay Reservation Land, owned by Malay, from being charged to any party which is not categorised as Malay*

E In 1997, the appellant ('the plaintiff') had granted banking facilities to Teh Two Kea (trading under the name of Leong Hin Company) ('the first defendant') and to secure the facilities, the respondent ('the second defendant'), a Malay, executed a charge over his land, which was a Malay Reservation Land ('MRL'). When the first defendant defaulted on the loan,
F the plaintiff commenced an action at the High Court against the first and second defendants, to recover the sums due. A default judgment was entered against the second defendant where he was ordered to pay the plaintiff the sums due. In 2012, the plaintiff filed a bankruptcy notice against the second defendant, followed by a creditor's petition. The second defendant opposed
G the petition and, in the meantime, sought an order that the hearing of the creditor's petition be stayed pending disposal of his application to set aside the default judgment. The application was granted by the Senior Assistant Registrar ('SAR'). The second defendant then applied to set aside the default judgment but the application was dismissed and an appeal to the High Court,
H before Zakiah Kassim JC, proved futile. The second defendant appealed to the Court of Appeal. The SAR proceeded to hear the creditor's petition and concluded by making receiving and adjudicating orders ('ROAO') against the second defendant. The second defendant appealed against the said decision at the High Court, before Abu Bakar Katar JC, but the same was dismissed. The second defendant appealed to the Court of Appeal against the said
I decision. There were then two appeals, namely the appeal against the

decision of (i) Zakiah Kassim JC affirming the default judgment ('the first appeal'); and (ii) Abu Bakar Katar JC affirming the ROAO ('the second appeal'). The Court of Appeal first dealt with the first appeal as it was first in time and if it were to allow the appeal and set aside the default judgment, the decision of Abu Bakar Katar JC affirming the decision of the SAR to issue the ROAO would have to be set aside as a consequence because, with the setting aside of the default judgment, the whole substratum of the ROAO, on which the decision was based, would no longer be in existence. The Court of Appeal allowed the first and second appeals and set aside the default judgment and the ROAO. In reversing the decision of the High Court, the Court of Appeal held that (i) the operative words, in s. 6(1) of the Kedah Malay Reservations Enactment No. 63 ('the Enactment'), were 'no right or interest therein shall vest … in any person who is not a Malay', which having regard to the Legislative scheme of the Enactment, must refer to any act of vesting any right or interest in any MRL in a non-Malay, including but not limited to 'sale' at the instance of a chargee; (ii) as the plaintiff was a non-Malay, the vesting in the plaintiff, of the interest in the MRL by way of the third party charge, was null, void and of no effect; (iii) the fact that the plaintiff was a non-natural person was not relevant because, under the Enactment, a non-natural person, such as a commercial bank, a private limited company, or even a society could qualify as a Malay; and (iv) there seemed to be a conflict between the second paragraph in Schedule A and s. 6(2) of the Enactment. Hence, the present appeal. The issue that arose for adjudication was whether the Enactment prohibits a MRL, owned by a Malay, from being charged to any party which is not categorised as a Malay under the Enactment.

Held (allowing appeal)
Per Ahmad Maarop PCA delivering the judgment of the court:

(1) Under s. 6 of the Enactment, it is clear that sale at the instance of a chargee is prohibited but there is nothing under it which prohibits the creation of a charge of a MRL owned by a Malay to a non-Malay. In other words, under the Enactment, there is no express prohibition against the creation of a charge over MRL in favour of non-Malays. That is deliberate. If the Legislature had intended to prohibit the creation of such a charge, it would have expressly provided so. (para 17)

(2) The court disagreed with the reasonings by the Court of Appeal in its construction of s. 6(1) of the Enactment. The words 'no right or interest therein shall vest' are governed by 'whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise'. The keywords which qualify the vesting of the right or interest in a document of title of a MRL of a Malay to a non-Malay, are vitally, 'transfer' and 'sale'. The general words 'or otherwise' in the phrase 'no right or

interest therein shall vest, whether by transfer, or sale in execution of a decree, sale at the instance of a chargee or otherwise', should be read *ejusdem generis* with the specific words 'transfer, sale in execution of a decree, sale at the instance of a chargee' where the effect was the devolution of proprietorship of the land. (para 19)

(3) The court disagreed with the Court of Appeal's observation that there seemed to be a conflict between the second paragraph in Schedule A and s. 6(2) of the Enactment. The provisions of the third paragraph of Schedule A are clear. All documents of titles, except permits, *banchi sewa* and *surat akuan*, may be charged to anyone. There is no prohibition against the charging of document of titles other than the three types of documents specified. The rest of the provisions of the third paragraph is also clear. If the chargor does not pay the money due, the land, if owned by a Malay, may only be sold to a Malay. In other words, the land could not be sold to a non-Malay. The provisions in the third para. Schedule A are consistent with the operation of s. 6 of the Enactment. Indeed, this fortified the effect of that section. To reiterate, the section prohibits the sale of the land at the instance of the chargee but it does not prohibit the creation of a charge of a MRL to a non-Malay. The charge was valid. (paras 23 & 27)

(4) The decision of the Court of Appeal was set aside. The orders of Zakiah Kassim and Abu Bakar Katar JCs were affirmed. (para 29)

Bahasa Malaysia *Headnotes*

Pada 1997, perayu ('plaintif') telah memberi kemudahan perbankan kepada Teh Two Kea (berdagang bawah nama Leong Hin Company) ('defendan pertama') dan demi mencagar kemudahan ini, responden ('defendan kedua'), seorang Melayu, memajakkan tanahnya, iaitu sebidang Tanah Rizab Melayu ('TRM'). Apabila defendan kedua ingkar dalam pinjamannya, plaintif memulakan satu tindakan terhadap defendan pertama dan kedua di Mahkamah Tinggi untuk memperoleh semula jumlah terhutang. Satu penghakiman ingkar direkodkan terhadap defendan kedua dan dia diperintahkan membayar jumlah terhutang kepada plaintif. Pada 2012, plaintif memfailkan notis kebankrapan terhadap defendan kedua, disusuli oleh petisyen pemiutang. Defendan kedua membantah petisyen ini dan, pada masa yang sama, memohon perintah agar perbicaraan petisyen pemiutang digantung sementara pelupusan permohonan penghakiman pemiutang. Permohonan tersebut dibenarkan oleh Penolong Kanan Pendaftar. Defendan kedua kemudian memohon untuk mengetepikan penghakiman ingkar tetapi permohonan ini ditolak dan rayuan di Mahkamah Tinggi, di hadapan Zakiah Kassim PK, tidak berjaya. Defendan kedua merayu di Mahkamah Rayuan. Penolong Kanan Pendaftar meneruskan dengan pendengaran petisyen

pemiutang dan menyimpulkan dengan membuat perintah penerimaan dan adjudikasi ('ROAO') terhadap defendan kedua. Defendan kedua merayu terhadap keputusan ini di Mahkamah Tinggi, di hadapan Abu Bakar Katar PK, tetapi rayuan ini ditolak. Defendan merayu terhadap keputusan tersebut di Mahkamah Rayuan. Oleh itu, terdapat dua rayuan, khususnya rayuan terhadap keputusan (i) Zakiah Kassim PK mengesahkan penghakiman ingkar ('rayuan pertama'); dan (ii) Abu Bakar Katar PK mengesahkan ROAO ('rayuan kedua'). Mahkamah Rayuan mendengar rayuan pertama dahulu kerana rayuan ini timbul dahulu dan jika Mahkamah Rayuan membenarkan rayuan dan mengetepikan penghakiman ingkar, keputusan Abu Bakar Katar PK mengesahkan keputusan Penolong Kanan Pendaftar mengeluarkan ROAO perlu diketepikan kerana, dengan pengetepian penghakiman ingkar, asas keseluruhan ROAO, yang menjadi asas keputusan, tidak lagi wujud. Mahkamah Rayuan membenarkan rayuan pertama dan kedua dan mengetepikan penghakiman ingkar dan ROAO. Mengakas keputusan Mahkamah Tinggi, Mahkamah Rayuan memutuskan (i) perkataan-perkataan operatif, dalam s. 6(1) Enakmen Rizab Melayu Kedah No. 63 ('Enakmen'), adalah 'no right or interest therein shall vest ... in any person who is not a Malay', mengambil kira skima Badan Perundangan dalam Enakmen, semestinya merujuk apa-apa tindakan meletak hak atau kepentingan TRM pada seorang bukan Melayu, termasuk tetapi tidak terhadap jualan atas permintaan pemegang gadaian; (ii) oleh kerana plaintif bukan Melayu, peletakan hak pada plaintif, akan kepentingan TRM melalui pajakan pihak ketiga tidak sah, terbatal dan tiada kuat kuasa; (iii) fakta plaintif seorang 'non-natural person' tidak relevan kerana bawah Enakmen, 'non-natural person, seperti bank komersial, syarikat sendirian berhad, bahkan persatuan boleh berkelayakan menjadi Melayu; dan (iv) terdapat percanggahan antara perenggan kedua Jadual A dan s. 6(2) Enakmen. Maka timbul rayuan ini. Isu yang timbul untuk diputuskan ialah sama ada Enakmen melarang TRM, yang dimiliki seorang Melayu, daripada dipajak pada mana-mana pihak yang tidak tergolong sebagai Melayu bawah Enakmen.

Diputuskan (membenarkan rayuan)
Oleh Ahmad Maarop PMR menyampaikan penghakiman mahkamah:

(1) Bawah s. 6 Enakmen, jelas bahawa jualan atas permintaan pemegang gadaian dilarang namun tiada apa-apa bawahnya yang melarang pembentukan pajakan TRM yang dimiliki oleh seorang Melayu kepada seorang bukan Melayu. Dalam erti kata lain, bawah Enakmen, tiada larangan nyata terhadap pembentukan TRM untuk bukan Melayu. Ini disengajakan. Jika Badan Perundangan berniat melarang pembentukan pajakan sedemikian, pastinya diperuntukkan sedemikian dengan nyata.

(2) Mahkamah tidak setuju dengan alasan Mahkamah Rayuan dalam tafsiran s. 6(1) Enakmen. Perkataan-perkataan 'no right or interest therein shall vest' diselia oleh 'whether by transfer, sale in execution of a decree, sale at the instance of a charge or otherwise'. Kata-kata kunci yang melayakkan peletakan hak atau kepentingan dalam dokumen hak milik TRM seorang Melayu kepada seorang bukan Melayu, asasnya, adalah 'transfer' dan 'sale'. Perkataan-perkataan 'or otherwise' dalam ungkapan 'no right or interest therein shall vest, whether by transfer, or sale in execution of a decree, sale at the instance of a charge or otherwise', wajar dibaca *ejusdem generis* dengan perkataan-perkataan khusus 'transfer, sale in execution of a decree, sale at the instance of a chargee' yang kesannya ialah pindah milik milikan tanah tersebut.

(3) Mahkamah tidak setuju dengan pengamatan Mahkamah Rayuan bahawa terdapat percanggahan antara perenggan kedua Jadual A dan s. 6(2) Enakmen. Peruntukan perenggan ketiga Jadual A jelas. Semua dokumen hak milik, kecuali permit, banchi sewa dan surat akuan boleh dipajak pada siapa-siapa. Tiada larangan terhadap pajakan dokumen hak milik selain tiga jenis dokumen yang dinyatakan. Peruntukan jadual ketiga, selebihnya, juga jelas. Jika pemajak tidak membayar wang terhutang, tanah tersebut, jika dimiliki seorang Melayu, hanya boleh dijual kepada seorang Melayu. Dalam kata-kata lain, tanah tersebut tidak boleh dijual kepada seorang bukan Melayu. Peruntukan dalam perenggan ketiga Jadual A selaras dengan operasi s. 6 Enakmen. Ini sememangnya mengukuhkan lagi kesan seksyen tersebut. Diulangi bahawa seksyen ini melarang jualan tanah atas permintaan pemegang gadaian tetapi ini tidak melarang pembentukan pajakan oleh seorang Melayu kepada seorang bukan Melayu. Pajakan tersebut sah.

(4) Keputusan Mahkamah Rayuan diketepikan. Perintah Zakiah Kassim dan Abu Bakar Katar PK disahkan.

Case(s) referred to:

Affin Bank Berhad lwn. Wakil Diri Bagi Harta Pusaka Teh Two Kea, Simati & Satu Lagi [2014] 1 LNS 1135 HC ***(refd)***

Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor [2017] 4 CLJ 265 FC ***(refd)***

Sime Securities Sdn Bhd v. Tetuan Projek Kota Langkawi Sdn Bhd [1999] 1 LNS 135 HC ***(refd)***

Tenaga Nasional Bhd v. Ong See Teong & Anor [2010] 2 CLJ 1 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 78(1)

National Land Code (Penang and Malacca) Titles Act 1963, s. 108

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For the respondent - P Latsmanan, Leonard Anselm Gomes, Cheryl Anne Gomes & Danielle Andrea Gomes; M/s Khor Gaik Thiam & Latsmanan

For the interveners:
The Association of Banks in Malaysia - Yoong Sin Min & Cheah Faan Jin; M/s Shook Lin & Bok
Persatuan Institusi Perbankan Islam Malaysia - Mohd Johan Lee & Mohd Nakhaie Ishak; M/s J Lee & Assocs
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[Editor's note: For the Court of Appeal judgment, please see Jamaludin Jaafar v. Affin Bank Bhd & Another Appeal [2017] 2 CLJ 547 (overruled); For the High Court judgment, please see [2014] 1 LNS 1135 (affirmed).]

Reported by Najib Tamby

JUDGMENT

Ahmad Maarop PCA:

[1] These grounds of judgment are prepared pursuant to s. 78(1) of the Courts of Judicature Act 1964, as Hasan Lah FCJ and Jeffrey Tan Kok Wha FCJ had since retired.

[2] The parties will be referred to as they were in the High Court (Alor Setar High Court Civil Suit No: 22-189-06-2011).

[3] The case concerns the appeal by the plaintiff against the decision of the Court of Appeal which had, on 14 July 2015, reversed the decision of the High Court in favour of the plaintiff. Leave to appeal was granted to the plaintiff on the following question:

> Whether the Kedah Malay Reservations Enactment No. 63 prohibits a Malay Reservation Land owned by a Malay from being charged to any party which is not categorised as a Malay under the Kedah Malay Reservations Enactment No. 63?

[4] We heard the appeal on 13 November 2017. We unanimously allowed the plaintiff's appeal with costs. We answered in the negative the question in respect of which the leave to appeal was granted. We set aside the decision of the Court of Appeal.

[5] The following are the reasons for our decision.

[6] The background facts leading to the appeal in this case are these. In 1997, the plaintiff granted banking facilities to the first defendant, Teh Two Kea (trading under the name of Leong Hin Company). To secure the facilities, the second defendant (Jamaludin bin Jaafar) executed a charge over his land described as GM23135, Lot No. 1451, Mukim Langgar, Alor Setar, Kedah ("the land"). The land was Malay reserve land and the second defendant was a Malay. When the first defendant defaulted on the loan, the plaintiff filed a civil action in the Alor Setar High Court against the first and the second

defendants, *vide* Civil Suit No: 22-189-06-2011, to recover the sum due on the banking facilities and the interest which accrued thereon. On 16 October 2011, a default judgment was entered against the second defendant whereby the second defendant was ordered to pay the plaintiff a sum of RM998,527.86 with interest at the rate of 3.5% per annum calculated on a monthly basis from 1 April 2012 until full payment. On 16 July 2012, the plaintiff filed a bankruptcy notice against the second defendant, followed by a creditor's petition six months later on 22 January 2013. The second defendant opposed the petition and duly served on the plaintiff his notice of intention to oppose the petition. In the meantime, the second defendant filed a summons in chambers seeking for an order that the hearing of the creditor's petition be stayed pending disposal of his application to set aside the default judgment. The application was granted by the learned Senior Assistant Registrar (SAR) on 22 May 2013.

[7] On 27 March 2013, the second defendant filed an application to set aside the default judgment. On 12 September 2013, the learned SAR of the High Court dismissed that application. On 13 November 2013, the learned Judicial Commissioner of the High Court (Zakiah Kassim JC) dismissed the second defendant's appeal. The second defendant appealed to the Court of Appeal.

[8] The learned SAR fixed the creditor's petition filed by the plaintiff for hearing on 13 January 2014. Learned counsel for the second defendant applied for postponement of the hearing of the creditor's petition pending the disposal of the second defendant's appeal to the Court of Appeal against the decision of Zakiah Kassim JC which affirmed the default judgment decision of the learned SAR. Learned counsel for the plaintiff objected to the postponement. The learned SAR proceeded to hear the creditor's petition, at the conclusion of which she made the receiving and adjudication orders ("the ROAO") against the second defendant. The second defendant appealed to the judge in chambers against that decision but on 11 August 2014 the learned Judicial Commissioner (Abu Bakar Katar JC) dismissed the application. The second defendant appealed to the Court of Appeal against that decision. Thus, there were then two appeals before the Court of Appeal:

(a) the appeal against the decision of Zakiah Kassim JC on 13 November 2013 affirming the default judgment; and

(b) the appeal against the decision of Abu Bakar Katar JC on 11 August 2014 affirming the ROAO.

[9] The Court of Appeal first dealt with the appeal against the decision of Zakiah Kassim JC because, according to the Court of Appeal, it was first in time, and also because if it were to allow the appeal and set aside the default judgment, the decision of Abu Bakar Katar JC affirming the decision of the

learned SAR to issue the ROAO would have to be set aside as a consequence because with the setting aside of the default judgment, the whole substratum of the ROAO on which the decision was based would no longer be in existence.

[10] On 14 July 2015, the Court of Appeal allowed the second defendant's appeal against Zakiah Kassim JC's decision and set aside the default judgment. Consequently, the appeal against Abu Bakar Katar JC's decision was allowed and the ROAO was set aside.

[11] On 16 January 2017, the plaintiff was granted leave to appeal to this court on the question which we have adverted to.

[12] On the same date, this court also allowed the Association of Banks in Malaysia (the first intervener) and Persatuan Institusi Perbankan Islam Malaysia (the second intervener) to intervene in the plaintiff's appeal to this court.

In The High Court

[13] In dismissing the second defendant's appeal to the judge in chambers, and affirming the learned SAR's decision in entering judgment in default against the second defendant, Zakiah Kassim JC essentially held that the plaintiff was a company, and not a natural person as defined under s. 2 of the Kedah Malay Reservations Enactment No. 63 (the Kedah Malay Reservation Enactment), and that Schedule A of the Enactment provides that "All documents of title except Permits, Banchi Sewa, and Surat Akuan may be charged to anyone." Therefore, the Malay reservation land owned by the second defendant could be charged under the Enactment. The learned JC relied on *Affin Bank Berhad lwn. Wakil Diri Bagi Harta Pusaka Teh Two Kea, Simati & Satu Lagi* [2014] 1 LNS 1135. This is what the learned JC said:

> [7] Plaintif dalam kes ini adalah sebuah syarikat yang ditubuhkan di bawah Akta Syarikat 1965 dan bukan "natural person" di bawah Akta Syarikat dan bukannya "natural person" yang dimaksudkan di bawah Section 2 Malay Reservation Enactment.
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> [8] Schedule A dalam Malay Reservation Enactment memperuntukkan bahawa:
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> > all documents of title except permits, Banchi Sewa, and Surat Akuan may be charged to anyone; ...
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> [9] Oleh itu tanah rizab Melayu yang dimiliki Perayu boleh digadai di bawah Enakmen Rizab Melayu Kedah.
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> Dalam kes *Sime Bank v. Tetuan Projek Kota Langkawi Sdn Bhd* [1999] 1 CLJ 307, persoalan timbul samada menurut peruntukan Seksyen 6 Enakmen Rezab Melayu Kedah, tanah rezab Melayu boleh dicagar kepada Plaintif yang bukan Melayu bagi maksud Enakmen Rezab Melayu Kedah. Yang Arif Hakim Hishamuddin Yunus telah memutuskan bahawa;

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> Under the State of Kedah Malay Reservation Enactment, the plaintiff, although being a company and therefore not a Malay, as defined by the Enactment, is allowed to be a chargee in respect of a Malay reservation land;

In The Court Of Appeal

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[14] In reversing the decision of the High Court, the Court of Appeal held that the operative words in s. 6(1) of the Kedah Malay Reservations Enactment are 'no right or interest therein shall vest ... in any person who is not a Malay' which having regard to the legislative scheme of the Kedah Enactment must refer to any act of vesting any right or interest in any Malay

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reservation land in a non-Malay, including but not limited to 'sale' at the instance of a chargee. As the plaintiff was a non-Malay, the vesting in the plaintiff of interest in the Malay reservation land in question by way of the third party charge was null and void and of no effect. The fact that the plaintiff was a non-natural person was not relevant because under the Kedah

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Malay Reservations Enactment, a non-natural person such as a commercial bank, a private limited company or even a society could qualify as a Malay. This is what the Court of Appeal said in its judgment:

> [27] In arriving at her decision the learned JC relied heavily on the judgment of Hishamudin Yunus J (as he then was) delivered 17 years ago

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in *Sime Bank v. Tetuan Projek Kota Langkawi Sdn Bhd* [1999] 1 CLJ 307; [1998] 4 MLJ 334. Two things must be kept in mind when considering this case. Firstly, the charged land was a Malay reservation land and secondly, the chargee bank (Sime Bank) was a non-Malay within the meaning of s. 2 of the Kedah Enactment.

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> [28] The issue in that case, like the issue before us, was whether under s. 6 of the Kedah Enactment, a Malay reservation land could be charged to the plaintiff bank, a non-Malay. While acknowledging that the object of the Kedah Enactment was to protect Malay rights by preventing reservation lands from falling into the hands of non-Malays, the learned judge nevertheless went on to hold:

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> (a) under the State of Kedah Malay Reservation Enactment, the Plaintiff, although being a company and therefore not a Malay as defined by the Enactment, is allowed to be a chargee in respect of a Malay reservation land.

> [29] From our reading of the judgment, the sheet anchor of the learned

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judge's reasoning was that since the word 'Malay' in s. 2 of the Kedah Enactment only refers to natural persons and not to non-natural persons, the plaintiff bank being a non-natural person was neither Malay nor non-Malay and as such was not caught by s. 6 of the Kedah Enactment which prohibits a non-Malay from holding any right or interest in any Malay reservation land. The word 'Malay' is defined by s. 2 to mean:

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> a person professing the Muslim religion and habitually speaking the Malay language of whose parents one at least is a person of Malayan race or of Arab descent.

[30] The effect of Hishamudin Yunus J's decision is that a Malay reservation land in Kedah could be charged to any non-natural person such as a commercial bank or a licensed 'Along' operating as a private limited company irrespective of whether such non-natural person is a Malay or otherwise within the meaning of s. 2 read with the Second Schedule to the Kedah Enactment.

[31] With all due respect to the learned judge, we must say at the outset that we are unable to accept his reasoning as a correct proposition of law. To give s. 6 of the Kedah Enactment the construction that the learned judge had given would be to give a construction that would defeat the object of the provision rather than to put its object into effect.

[32] The issue before His Lordship was a straightforward issue of whether any right or interest in any Malay reservation land could vest in a non-Malay. The answer to the question is self evident in s. 6 itself, which we reproduce below for ease of reference:

> 6(1) Save as hereinafter provided in this Enactment, where any Reservation land is held under a document of title by a Malay, no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not a Malay and where any Reservation land is held under a document of title by a Siamese no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not either a Malay or a Siamese.
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> (2) Any document or agreement purporting to vest in any person any right or interest contrary to the provisions of sub-section (1) shall be void.

[33] Subsection (2) above is clear and unambiguous, that any document or agreement purporting to vest in a non-Malay any right or interest in any Malay reservation land 'shall be void'. So strict is the prohibition that even an attempt at such act by a Malay is threatened by s. 7 with forfeiture of his land, which 'shall thereafter vest in the Sultan absolutely'.

[34] The operative words in sub-s (1) are 'no right or interest therein shall vest ... in any person who is not a Malay' which having regard to the legislative scheme of the Kedah Enactment must refer to any act of vesting any right or interest in any Malay reservation land in a non-Malay, including but not limited to 'sale' at the instance of a chargee.

[35] As the plaintiff bank in that case was a non-Malay, the vesting in the bank of interest in the Malay reservation land in question by way of the third party charge was therefore null and void and of no effect. The fact that the plaintiff bank was a non-natural person was irrelevant because under the Kedah Enactment a non-natural person such as a commercial bank, a private limited company or even a society could qualify as a Malay.

[36] Even the Malayan Borneo Building Society is a 'Malay' under the Kedah Enactment although obviously it is a not a natural person (see the Second Schedule). The long list of non-natural persons in the Second Schedule dispels any notion that only natural persons can qualify as 'Malay' under the Enactment.

[37] The flaw in the learned judge's reasoning is that it did not read into s. 6 the provisions of s. 19 read together with the Second Schedule to the Kedah Enactment. If he had, His Lordship would have realised that although Sime Bank, the plaintiff in that case, was a non-natural person, it would have qualified as a 'Malay' under the Enactment had it been declared as a Malay by the Ruler-in-Council pursuant to s. 19, which provides as follows:

> 19 Power to declare other person to be Malay.
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> The Ruler-in-Council may, in his discretion, notwithstanding anything in this Enactment contained, by order in writing declare that any person of race or nationality be deemed to be a Malay for the purposes of this Enactment, and such person shall then be deemed to be included in the term 'Malay' wherever it shall occur in this Enactment or in any amendment or re-enactment thereof.

[38] Thus, the reason why Sime Bank was not a 'Malay' within the meaning of s. 2 of the Kedah Enactment was not because it was not a natural person as opined by the learned judge but because it had never been declared as a Malay by the Ruler-in-Council pursuant to s 19. In the circumstances, we are constrained to hold that *Sime Bank* was decided *per incuriam* and can no longer be regarded as good law in so far as it ruled that a Malay reservation land could be charged to a non-Malay.

[39] In *RAP Nathan v. Haji Abdul Rahman Haji Yusoff & Ors* [1979] 1 LNS 85; [1980] 1 MLJ 248, a case which the learned judge followed, Syed Agil Barakbah J (as he then was) by way of *obiter* held the following view at p 251:

> In the second paragraph of the Schedule it is stated that all documents of title except permits, Banchi Sewa and Surat Akuan may be charged to anyone. If the chargor does not pay the money due, the land so charged if owned by a Malay can be sold only to a Malay or a Siamese. In short, subject to what is stated above as regards to sale, the (Kedah) Enactment allows reservation land to be charged to a non-Malay.

[40] The second paragraph of the Schedule that Syed Agil Barakbah J referred to in the above passage is in fact the third paragraph of Schedule A to the Kedah Enactment which reads:

> All documents of title except Permits, Banchi Sewa, and Surat Akuan may be charged to anyone; but if the chargor does not pay the money due the land if owned by a Malay may be sold only to a Malay, and if owned by a Siamese may be sold only to a Malay or a Siamese.

[41] There seems to be a conflict between this paragraph and s. 6(2) of the Kedah Enactment. This paragraph says that documents of title may be charged to 'anyone' (which necessarily includes a non- Malay) except that the land may be sold only to a Malay if the chargor does not pay the money due, whereas s. 6(2) says that the vesting of any such 'right' or 'interest' in a non-Malay 'shall be void'.

[42] The view that we take on this apparent legislative discrepancy is that although Schedule A is part and parcel of the Kedah Enactment and must not therefore be ignored, it cannot override the substantive provision that governs the legality or otherwise of the act of vesting in a non-Malay any right or interest in any Malay reservation land, and that provision is s. 6 of the Kedah Enactment. In fact the last paragraph of the Schedule that Syed Agil Barakbah J referred to in *RAP Nathan* contains the following endorsement:

> This notice is **published for information** only and **shall not be deemed to vary the provisions of this Enactment**. (emphasis added.)

[46] Back to the present appeal, the fact that Affin Bank is a non-Malay is beyond dispute as its name does not appear in the Second Schedule to the Kedah Enactment. There are presently only two banks listed in the Second Schedule, namely Bank Bumiputra Malaysia Bhd and Bank Pertanian Malaysia Bhd. Being not listed in the Second Schedule and therefore a non-Malay, Affin Bank is prohibited by s. 6 of the Kedah Enactment from holding any right or interest, including as chargee, in the Malay reservation land that had been charged to it by the appellant.

Our Decision

[15] The sole question in respect of which the leave to appeal was given, brings into focus the effect of the provisions of s. 6 of the Kedah Malay Reservations Enactment. This necessarily involves the exercise of the function of a court in construing a statute. Reiterating this function, in *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v. Kesatuan Kebangsaan Pekerja-Pekerja Bank & Anor* [2017] 4 CLJ 265; [2017] 2 ILR 230, this court said:

[52] The function of a court when construing an Act of Parliament is primarily to interpret the statute in order to ascertain what the legislative intent is. And this is primarily done by reference to the words used in the provision. *Craiese on Legislation* (9th edn, 2008) at p. 611 states:

> The cardinal rule for the construction of legislation is that it should be construed according to the intention expressed in the language used. So the function of the court is to interpret legislation 'according to the intent of them that made it' and that intent is to be deduced from the language used

[16] Section 6 of the Kedah Malay Reservations Enactment provides:

> 6.(1) Save as hereinafter provided in this Enactment, where any Reservation land is held under a document of title by a Malay, **no right or interest therein shall vest**, whether by **transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise**, in any person who is not a Malay and where any Reservation land is held under a document of title by a Siamese no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not either a Malay or a Siamese.
>
> (2) Any document or agreement purporting to vest in any person any right or interest contrary to the provisions of sub-section (1) shall be void. (emphasis added)

[17] In our view, under s. 6, it is clear that sale at the instance of a chargee is prohibited, but there is nothing thereunder which prohibits the creation of a charge of a Malay reservation land owned by a Malay to a non-Malay. In other words, under the Kedah Malay Reservations Enactment, there is no express prohibition against the creation of a charge over Malay reserve land in favour of non-Malays. That, in our view, is deliberate. If the Legislature had intended to prohibit the creation of such a charge, it would have expressly provided so.

[18] In this regard, as a matter of comparison, Malay Reservation Enactments in West Malaysia (other than the State of Kelantan) provide for express provisions which prohibit the charging of Malay reservation land to non-Malays. The relevant comparable provisions are as follows:

(a) Section 8 of the Malay Reservations Enactment (FMS Cap 142), which is applicable to the States of Negeri Sembilan, Pahang, Perak, Selangor and the Federal Territory of Kuala Lumpur provides:

> 8. Restriction as to transfers, charges and leases.
>
> (i) Subject to the provisions of sub-section (ii) and of sections 16 and 17 no Malay holding shall be transferred, **charged** or otherwise disposed of to any person not being a Malay, and no memorandum of transfer, **charge** or lease in contravention of this section shall be capable of registration in any Land Office or Registry of Titles.

(b) Section 9 in the Johor Malay Reservations Enactment No. 1 of 1936 provides:

> 9. Restriction as to transfers, charges and leases.
>
> (i) Subject to the provisions of sub-section (ii) and of sections 17 and 18 no Malay holding shall be transferred, **charged**, leased or otherwise disposed of to any person not being a Malay, and no memorandum of transfer, **charge** or lease in contravention of this section shall be capable of registration in any Land Office.

(c) Section 5A of the Perlis Malay Reservations Enactment No. 7 of 1353 provides:

5A. Restriction of dealings in Reservation Land.

(i) Save as hereinafter provided in this Enactment, no Reservation Land held under a document of title by any Malay shall be mortgaged, **charged** or leased to any person who is not a Malay and no Reservation Land held under a document of title by any Siamese shall be mortgaged, **charged** or leased to any person who is not either a Malay or a Siamese.

(d) Section 9 of the Terengganu Malay Reservations Enactment No. 17 of 1360 provides:

9. Restriction as to transfers, charges and leases.

(i) Subject to the provisions of sub-section (ii) and (iii) of this section and of sections 11 and 19, no Malay holding shall be transferred, **charged**, leased or otherwise disposed of to any person not being a Malay, and no memorandum of transfer, **charge**, or lease in contravention of this section or any other sections in this Enactment shall be capable of registration in any Land Office or Registry of Titles.

(e) Section 108 of the National Land Code (Penang and Malacca) Titles Act 1963, which is applicable in the states of Penang and Malacca provides:

108. Limitation.

(1) Subject to Chapter 3, the following provisions shall apply to land subject to this Part:

(a) no such land may at any time be transferred, leased, transmitted or **charged** to any person other than a Malay. For this purpose "lease" does not include a tenancy for a term not exceeding three years or a lease for a term exceeding three years but not exceeding thirty years;

[19] The reasoning of the Court of Appeal in its construction of s. 6(1) of the Kedah Malay Reservations Enactment is that the operative words thereunder are "no right or interest therein shall vest ... in any person who is not a Malay". It then said that having regard to the legislative scheme of the Kedah Enactment, those words must refer to any act of vesting of any right or interest in any Malay reservation land to a non-Malay which includes but is not limited to "sale" at the instance of a chargee. That expansive construction includes the vesting in the plaintiff of interest in the Malay reservation land in question by a third party charge which the Court of Appeal held to be null and void and of no effect. With respect, for reasons which we will give shortly, we are unable to agree. The words "no right or interest therein shall vest" are governed by "whether by transfer, sale in

execution of a decree, sale at the instance of a chargee or otherwise." The keywords which qualify the vesting of the right or interest in a document of title of a Malay reservation land of a Malay to a non-Malay, are vitally, "transfer" and "sale". The general words "or otherwise" in the phrase "no right or interest therein shall vest, whether by transfer, or sale in execution of a decree, sale at the instance of a chargee or otherwise", should be read *ejusdem generis* with the specific words "transfer, sale in execution of a decree, sale at the instance of a chargee", where the effect is the devolution of proprietorship of the land. In *Tenaga Nasional Bhd v. Ong See Teong & Anor* [2010] 2 CLJ 1, Augustine Paul FCJ speaking for this court said:

> [44] ... My view is that since these preceding words are general words which follow particular and specific words of one genus then it is presumed to be restricted to the same genus as the particular words. Meaning: the general expression is to be read as comprehending things of the same kind as that designated by the preceding particular expression unless there is something to show that a wider sense was intended - see *Public Prosecutor v. Pengurus Hong Trading & Co* [1984] 2 CLJ 67; [1984] 2 CLJ (Rep) 415 @ 417:
>
> > I am further of the view that the words 'other matter' found in reg. 3(v)(ii) of the regulation should be read *ejusdem generis* with "Prussian blue, lead or compounds of lead" which according to the Deputy Public Prosecutor are poisonous or deleterious to the human body. According to a well established rule of construction of statutes, general terms following particular ones apply only to such persons or things as are *ejusdem generis* with those comprehended in the language of the legislature. In other words the general expression is to be read as comprehending things of the same kind as that designated by the preceding particular expressions, unless there is something to show that a wider sense was intended.

[20] Creation of a charge does not involve transfer of the ownership of the land to the chargee. A charge does not vest proprietorship of the land in the chargee. The chargor remains the proprietor of the land. In this regard, the question whether a charge of Malay reservation land created in favour of a non-Malay contravened the Kedah Malay Reservation Enactment was considered by the High Court in *Sime Securities Sdn Bhd v. Tetuan Projek Kota Langkawi Sdn Bhd* [1999] 1 LNS 135; [1999] 4 MLJ 585. In his judgment, Alauddin J (later PCA) said:

> Does the charge in favour of the plaintiff contravene the Kedah Malay Reservations Enactment No 63 ('KMRE') and is therefore null and void.
>
> Upon perusal of the provisions of the KMRE, I would agree with learned counsel for the plaintiff that there is no express prohibition against the creation of a charge over Malay reserve land in favour of non-Malays in the KMRE.

Section 6 of the KMRE reads as follows:

Save as hereinafter provided in this Enactment where any Reservation land is held under a document of title by a Malay, no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not a Malay and where anywhere any reservation land is held under a document of title by a Siamese no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not either a Malay or a Siamese.

I would observe that the prohibition pursuant to s. 6(1) is applicable only restrictively in two respects, namely:

(i) it prohibits the vesting of any right or interest in a non-Malay which arises by reason of transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise.

(ii) the words 'or otherwise' means transactions of similar nature like 'transfer' and 'sale' where the consequence is a total devolution of interest in the property. The words 'or otherwise' should therefore be read 'ejusdem generis with 'transfer', 'sale in execution of a decree' and 'sale at the instance of a chargee'.

Section 8 of the KMRE provides thus:

No State land included in a Malay Reservation shall be sold, leased, or otherwise disposed of to any person who is not either:

a Malay, or

a Siamese certified by the Director in writing to be a Siamese agriculturist permanently resident in the state.

Section 8(1) does not prohibit creation of 'charges' over Malay Reservation land in favour of a non-Malay. What is restricted by statute here is only that such land shall not '... be sold, leased or otherwise disposed of. ..' A 'disposal' will only arise upon a sale of the charged land upon default and by s. 6(1) of the KMRE, there is sufficient safeguard that a purchaser at such a sale must be a 'Malay'. Again, the words 'otherwise disposed of' should be read *ejusdem generis* with the words - 'sold' and 'leased'. 'Sold' and 'leased' denoted situation where enjoyment of land is parted to another person. Such parting of the enjoyment of the land does not occur in a 'charge' situation.

Sections 6 and 8 of the KMRE if read together is consistent with and supports the argument of the plaintiff that a charge over a Malay reservation land in favour of a non-Malays is not prohibited under the KMRE. However upon a sale of such land, the purchaser must be a Malay.

Further, the position in Kedah, allowing creation of charges over Malay Reserve Lands even in favour of non-Malays **is confirmed** by the words used in Schedule A - Notice under the KMRE (issued under s. 12 of the KMRE). Paragraph 3 reads:

All documents of title except Permits, Banchi Sewa, and Surat Akaun may be charged to anyone; but if the chargor does not pay the money due the land if owned by a Malay may be sold only to a Malay, and if owned by Siamese may be sold only to a Malay or a Siamese.

Nothing can be more express and direct than these words to allow a charge over Malay reservation land in favour of a non-Malay in Kedah.

(emphasis added)

[21] In paras. [41] and [42] of its judgment (which we have reproduced above), the Court of Appeal said that there seems to be a conflict between second paragraph in Schedule A to the Kedah Malay Reservation Enactment and s. 6(2) of the Enactment.

[22] We disagree. Schedule A is as follows:

MALAY RESERVATIONS
STATE OF KEDAH
SCHEDULE A
ENACTMENT NO. 63 (MALAY RESERVATIONS)

Notice is hereby given that all the land situate ... has, by Notification No ... dated the ... day of ... 13 ... been included in a Malay Reservation.

From the said date no land owned by a Malay may be transferred to any person who is not a Malay, and no land owned by a Siamese may be transferred to a person who is not either a Malay or a Siamese.

All documents of title except Permits, Banchi Sewa, and Surat Akuan may be charged to anyone; but if the chargor does not pay the money due the land if owned by a Malay may be sold only to a Malay, and if owned by a Siamese may be sold only to a Malay or a Siamese.

A lease may be granted by the owner to any person for a period of not more than three years, provided that bendang land under ten relongs may not be leased by a Malay to any person other than a Malay or by a Siamese to any person other than a Malay or a Siamese to any person other than a Malay or a Siamese without the consent of the Land Officer.

If any person has before the ... day of ... arranged to sell his land to a person who is forbidden by this Enactment to purchase it or if he suffers any immediate material financial loss by the inclusion of his land in a Malay Reservation he may send a petition to the Ruler-in-Council who will decide finally.

All persons who own land in the said Malay Reservation should bring their titles to the Land Officer so that he may mark them "Malay Reservation". No fee and no payment has to be made for this.

This notice is published for information only and shall not be deemed to vary the provisions of this Enactment.

Dated at ... this ... day of ... 13 ...

Seal

...
Land Officer (emphasis added)

[23] The provisions of the third paragraph of Schedule A are clear. All documents of titles except permits, Banchi Sewa and Surat Akuan may be charged to anyone. There is no prohibition against the charging of document of titles other than the three types of documents specified therein. The rest of the provisions of the third paragraph is also clear. If the chargor does not pay the money due, the land, if owned by a Malay, may be sold only to a Malay. In other words, land cannot be sold to a non-Malay. In our view, the provisions in the third paragraph of Schedule A are consistent with the operation of s. 6 of the Kedah Malay Reservations Enactment. Indeed they fortify the effect of that section as we have construed it (See also Alauddin J's judgment in *Sime Securities v. Tetuan Projek Kota (supra)*). To reiterate, the section prohibits the sale of the land at the instance of the chargee, but it does not prohibit the creation of a charge of a Malay reservation land to a non-Malay.

[24] The Court of Appeal also said that there were flaws in the learned High Court Judge's reasoning in the *Sime Bank* case relied upon by Zakiah Kasim JC in that he did not read s. 19 together with the Second Schedule to the Kedah Malay Reservations Enactment. We have reproduced in para. [14] above that part of the Court of Appeal's judgment as contained in paras. [37] and [38] of the judgment.

[25] The Second Schedule purported to be the Schedule listing the entities declared to be "Malay" under s. 19 of the Enactment.

[26] In this regard, on 15 August 2017, this court allowed the first intervener to introduce, for the purpose of the appeal before this court, evidence in the form of the notification in the Government *Gazette* dated 12 January 2017 issued by the State Government of Kedah that the Second Schedule to the Kedah Malay Reservations Enactment listing the entities declared as "Malay" does not exist, and that the Kedah Enactment had never been amended to include the Second Schedule.

[27] In our view, even if the Second Schedule is part of the Kedah Malay Reservations Enactment, it does not change our interpretation on the effect of s. 6 of the Enactment, and our decision on the appeal. Section 19 of the Enactment gives power to the Ruler-in-Council in Kedah by order in writing to declare any entity to be a Malay for the purpose of the Enactment. The plaintiff had not been so declared. It was therefore a non-Malay for the purpose of the Enactment. However, since for reasons which we have explained, the Kedah Malay Reservations Enactment did not prohibit the charging of the second defendant's land to the plaintiff (a non-Malay), the charge was valid.

[28] For reasons which we have given, we answered the question in respect of which the leave to appeal was granted, in the negative.

A **[29]** In the result, we allowed the plaintiff's appeal. The decision of the Court of Appeal was set aside. The order of Zakiah Kassim JC dated 13 November 2013 was affirmed. The order of Abu Bakar Katar JC dated 11 August 2014 was affirmed.

B **[30]** We ordered costs of RM10,000 to the plaintiff, and costs of RM10,000 to each intervener. Costs were subject to the payment of allocator fees. We ordered the deposit to be refunded.

[31] Zaharah Ibrahim FCJ and Ramly Ali FCJ had expressed their agreement with these grounds of judgment.

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